IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

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No. 71-1196

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RALPH E. COREY and
ROBERT M. KIMBROUGH, Petitioners

v.

STATE SAVINGS & LOAN ASSOCIATION,
WALLACE C.S. YOUNG, and BETTER
BUILT HAWAII, LTD., Respondents.

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# PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

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## CITATIONS

Cases:


Bigelow v. Old Dominion Copper Co., 225 U.S. 127 (1912) ..... 2
Brooklyn City and N.R. Co. v. Nat'l. Bank of the Republic, 102 U.S. 14, 22 (1880) ..... 2
Keokuk and W. Railroad v. Missouri, 152 U.S. 301 ..... 2
Railroad Co. v. National Bank, 102 U.S. 14 ..... 2


Constitutional Provisions:


United States Constitution:
Seventh Amendment ..... 2
Fourteenth Amendment ..... 2


Texts:


Freeman on Judgments, § 159 ..... 2
Greenleaf on Evidence, 13th ed. vol. 1, § 524 ..... 2

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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

The petitioners herein respectfully move this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 15, 1972, and (2) granting the petition. As grounds for this motion, petitioners state the

following:

> Where the Opinion of a State Court Alternately Repudiates and Then Invokes Estoppel to Prejudicially Serve the Interest of the Respondent Mortgagee in Violation of the Elementary Rule that Estoppel Arising Out of a Prior Judgment is Equally Conclusive on All Parties to the Action, Does This State Action Deprive Petitioners of Their Rights Under the Seventh and Fourteenth Amendments to the Constitution of the United States?

The submissions heretofore made to this Court may not have shown how the State Court violated that ". . . principle of general elementary law that the estoppel of a judgment must be mutual, Railroad Co. v. National Bank, 102 U.S. 14; Keokuk and W. Railroad v. Missouri, 152 U.S. 301; Freeman on Judgments, § 159; Greenleaf on Evidence, 13th ed. vol. 1, § 524." Bigelow v. Old Dominion Copper Co., 225 U.S. 127 (1912).

Or, as expressed in Brooklyn City and N.R. Co. v. Nat'l. Bank of the Republic, 102 U.S. 14,

22 (1880):

> "An estoppel arising out of the judgment of a court of competent jurisdiction is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of them as his intent may happen to require."

The issue was raised in the Honolulu trial court (Civil No. 19985) when the mortgagee sought to introduce into evidence plaintiff's Exhibit 13, a certified copy of the Order Confirming Sale (i.e., the judgment) of the Kauai court (Civil No. 636).

The transcript of Civil No. 19985 reads in the parts pertinent as follows:

> "Mr. Campbell (Attorney for mortgagee): This particular item is res judicata because particular amounts and the expenses were determined by the judge in that court and set down as expenses and approved." (TR. 113.)
>
> "Mr. Campbell: I think all of those issues are res judicata.
>
> "Mrs. Ryan: The whole case is res judicata, Your Honor.
>
> "Mr. Campbell: On those particular issues

there is a collateral estoppel." (TR. 118.)

"Mr. Campbell: My point in introducing this is that this is a certified copy of an Order Confirming the Sale which has already met a finding of facts and law that these items are proper and correct. I don't think I have to prove them. This is a case of collateral estoppel where these particular issues were determined in that trial and an order entered determining these particular issues as of that date. What more do I need?" (TR. 120.)

"Mrs. Ryan: . . . Now he says that's all res judicata. If that's res judicata then the whole lawsuit is res judicata. . .

"Mr. Campbell: Collateral estoppel. This exact issue, namely, the amount of those things were determined in that suit. Those were found to be fact and approved.

"The Court: All right. The court will accept the determination made by the Kauai Court.

"Mrs. Ryan: Subject to the objection which I have stated." (TR. 123.)

Over petitioners' objections (preserved on appeal to the Hawaii Supreme Court), the jury was instructed as a matter of law "that the final order confirming sale (Exhibit 13) entered by the Fifth Circuit Court shall be accepted by you."

The Honolulu jury's verdict was in the exact amount of the deficiency noted in the Kauai order confirming sale.

The Honolulu trial court granted petitioners' post trial motions and set aside the money verdicts based solely on the Kauai judgment. Thus, it corrected its error, so that when the case went on appeal to the Hawaii Supreme Court, the lower court was, in effect, holding that neither the petitioners nor the mortgagee were estopped by the Kauai judgment.

The Hawaii Supreme Court reversed the trial court. Its Opinion (Petition, App. A), violates the elementary law that estoppels by judgment may not be repudiated and then invoked to suit the purposes of one of the parties. The opinion holds that the Kauai judgment did not estop the mortgagee from relitigating the liability of the petitioners for the deficiency on the judgment

even though the petitioners had been party defendants in the Kauai mortgage foreclosure action and even though the mortgagee waived the deficiency on the judgment in the Kauai suit. But the opinion holds that the Kauai judgment did estop petitioners from relitigating the amount of the mortgagee's damages, holding that, as against petitioners, the Kauai judgment was res judicata.

Mutuality of estoppel, in the sense involved here, is bottomed on the constitutional right to the equal protection of the law. Violation of the rule in this case deprived petitioners of their right to trial by jury as to damages, the jury being instructed that it must accept the Kauai judgment, the only "proof" of damages in the case. Petitioners were also deprived of due process of law in that they were not allowed to contest the issue of whether the mortgagee had an actionable case in fraud, since fraud without

damages is not actionable.

The question here presented was included within the proposition advanced by the petitioners to the Hawaii Supreme Court:

> "Appellant's Suggestion that Defendants in Fraud Cases May Not Contest on the Question of Damages is a Further Attempt to Deny Them Their Right to Trial by Jury and Their Right to Due Process of Law." (Answering Brief, S. Ct. No. 5021, pp. 14-17.)

If it is assumed that the mortgagee was not estopped by the first judgment from bringing the petitioners into court a second time, it follows, as a matter of "general elementary law," that the petitioners, in the second case, could not be estopped by the first judgment from showing the true (lack of) damages.

It is respectfully submitted that the judgment as to which certiorari is requested was secured by violating petitioners' rights to trial by jury, equal protection of the law and due process of law, and that the denial of certiorari should be

reconsidered.

## CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioners pray that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

DATED: Honolulu, Hawaii, this 5th day of June, 1972.

Respectfully submitted:

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## CERTIFICATE OF COUNSEL

As counsel for petitioners, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2), Rules of the Supreme Court of the United States.

DATED: Honolulu, Hawaii, this 5th day of June, 1972.

Helen B. Ryan

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